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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-96

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Petitioners*

v.

ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., *Respondents*

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Petitioners hereby respectfully submit the following reply to the briefs filed in opposition to the petition for writ of certiorari herein on behalf of federal respondents and National Council of Technical Service Industries (NCTSI).[1]

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[1] The brief on behalf of federal respondents was not received by counsel for petitioners by mail until October 11, 1978 albeit it was apparently filed with the Court on October 3, 1978.

I

THIS CASE PRESENTS AT LEAST TWO ISSUES OF OVERWHELMING IMPORTANCE TO THE ENTIRE FEDERAL CIVIL SERVICE SYSTEM AND TO THE OPERATION OF NASA UNDER ITS FEDERAL ENABLING STATUTE—QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, ESPECIALLY IN LIGHT OF THE TWO CONFLICTING COURT OF APPEALS DECISIONS IN THIS CASE ITSELF

Federal respondents argue in their brief that the issues involved in this case are unexceptional, and accordingly, there is no reason for review by this Court. Petitioner respectfully submits that contention is patently untrue.

This case squarely raises the following issues of vital, overwhelming importance to the entire federal civil service system and to the operation of the National Aeronautics and Space Administration (NASA) under its federal enabling statute—the National Aeronautics and Space Act of 1958, as amended:

1. Is NASA specifically required by its federal enabling Act (42 U.S.C. 2473(b)(2), now (c)(2)) to employ all but 425 regular civilian employees under the Civil Service laws and to pay them in accordance with the Classification Act of 1949, as amended?

2. Is NASA required, like other civilian departments and agencies of the Federal Government, to perform its regular civilian work functions with employees appointed and employed under the federal Civil Service laws and regulations—or may NASA simply ignore and circumvent those laws and regulations and obtain thousands of regular clerks, secretaries, blue collar workers and other employees it constantly needs to perform its governmental work functions through

the device of making scores of so-called "support service contracts" with private contractors and subcontractors at great additional cost to the Government?

It is extraordinarily imperative for this Court to settle these vitally important *federal questions* in this case, not only because neither question has ever been decided by this Court, but because here the record contains two dramatically conflicting decisions of the same Court of Appeals with reference to these two issues (see *Lodge 1858, AFGE* v. *NASA,* 436 F.2d 882, 892; and *Lodge 1858, AFGE* v. *NASA,* Appendix to petition, pp. 9a, 10a).

II

THE DISTRICT COURT RULED THE NASA SUPPORT SERVICE CONTRACTS FOUND ILLEGAL IN THIS CASE ARE SUBSTANTIALLY IDENTICAL TO THOSE NASA CONTRACTS HISTORICALLY RULED UNLAWFUL BY THE COMPTROLLER GENERAL AND THE CIVIL SERVICE COMMISSION. THUS, UNLESS THIS COURT REVIEWS AND REVERSES THE COURT OF APPEALS' DECISION, WHICH NEGATES BOTH THE DISTRICT COURT'S RULING AND THE GRAVAMEN OF THE COMPTROLLER GENERAL'S AND THE COMMISSION'S PRIOR RULINGS AS WELL, THE GOVERNMENT WILL BE FORCED TO PAY TENS OF MILLIONS OF DOLLARS EACH YEAR IN GROSSLY UNNECESSARY FEES AND CHARGES FOR THE PERFORMANCE OF NASA'S REGULAR GOVERNMENTAL WORK FUNCTIONS BY CONTRACTOR-SUPPLIED EMPLOYEES

Federal respondents' brief grievously misleads the Court by arguing that the NASA support service contracts ruled illegal by the District Court, but legitimized by the Court of Appeals' opinion in this case, are different from the long line of NASA support service contracts previously ruled illegal by both the Comptroller General of the United States and the Civil Service Commission.

That contention is absolutely incorrect and unsupportable, and federal respondents know it. *In fact, the record before this Court contains a formal written agreement executed by federal respondents themselves (and thereafter presented to the District Court) which admits that the NASA support service contracts at the Marshall Space Flight Center challenged in this case are improper and illegal—and on the strength of that concession, federal respondents cancelled 598 of the proposed 764 Civil Service reduction-in-force actions in this case on the ground they were tainted by "improper service contract operations"* (J.A. 188, 189; 1196).

Throughout all subsequent proceedings before the District Court, that Court carefully adopted and applied the same rules and standards the Comptroller General and the Commission had previously applied in NASA contract cases to support its rulings that certain of the NASA contracts in this case, which are substantially identical to those theretofore ruled unlawful by the two watchdog Government agencies, are likewise unlawful (see Supp. App. to petition, pp. 9; 18-21; 25-27; 33-34; 39). The District Court ruled that the NASA contracts found illegal in this case are *"strikingly similar"* to the NASA contracts historically ruled illegal by both the Comptroller General and the Commission (see Supp. App. pp. 39-40; 84-85).

By completely rejecting the legal and factual bases for the District Court's rulings in this case (which are substantially identical to those upon which the Comptroller General and the Commission relied in the prior cases), *the two-Judge Court of Appeals has literally opened the floodgates for private support service contractors, and has exposed the Government to the continuing loss of tens of millions of dollars each year in contractor fees and charges for merely supplying non-Civil Service employees to perform regular, everyday governmental work functions for NASA and other federal agencies that could readily be performed by regular government employees.*

In June, 1967, for example, the Comptroller General audited only three (3) NASA support service contracts at the Marshall Space Flight Center out of a total of eleven (11) then in effect (J.A. 270). The total *annual cost* to the Government of the eleven (11) contracts was $69.9 million (J.A. 270). The *annual cost* of the three (3) audited contracts was $24.4 million (J.A. 270). The Comptroller General not only concluded the three (3) audited contracts were unlawful, but that same resulted in a tremendous waste of Government money. He stated in his report to Congress (J.A. 270):[2]

> "Our comparison of costs showed that annual savings of about $4.8 million could have been achieved if the . . . services being obtained under contract in support of the three (NASA-MSFC) laboratories covered by our review were to be performed by civil service employees."

The Comptroller General's ruling then concluded (J.A. 291):

> "We believe that the results of our review clearly indicate that savings of some significance can be

[2] Comptroller General's Report To The Congress, No. B-133394, dated June 9, 1967, entitled, "Potential Savings Available Through Use of Civil Service Rather Than Contractor-furnished Employees for Certain Support Services—National Aeronautics and Space Administration."

achieved at MSFC and GSFC (Goddard Space Flight Center) if the services covered by our review are carried out by civil service employees rather than contractor personnel. Also, . . . it appears that additional savings could be achieved by NASA at MSFC and other centers."

Earlier, in 1964, the Comptroller General audited a selected NASA support service contract at the Goddard Space Flight Center near Washington, and specifically concluded, as the District Court did in the case at bar (J.A. 258, 259):[3]

> "We believe that the manner in which the operations under contract NAS 5-2078 . . . was carried out clearly showed that the terms of the contract intended that *the employees furnished to GSFC under the contract be controlled by the Government to substantially the same extent as civil service employees. This contractual arrangement resulted in a violation of the statutes governing Federal employment.*
>
> "The cost of the services procured under NAS 5-2078 was . . . *40% in excess of the cost that would have been incurred if the services had been performed by civil service employees who were subject to the Classification Act of 1949, as amended.*" [Italics supplied.]

Patently therefore, this Court's review of the vitally important federal questions presented by this case is totally essential. The Comptroller General, the Civil Service Commission, the Court of Appeals in 1970, and

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[3] Comptroller General's Report To The Congress, No. B-133394, dated October 19, 1964, entitled, "Violation of Statutes Governing Federal Employment and Excess Costs Incurred Under a Contract For Technical Writing and Related Services Awarded by the Goddard Space Flight Center—National Aeronautics and Space Administration."

the District Court have all decided that both NASA's organic statute and the federal Civil Service laws protect the United States against the huge waste of federal funds involved in scandalous private contractor raids on the Treasury when NASA enters into the type of support service contracts present in this case. A two-Judge Court of Appeals has erroneously ruled diametrically opposite on each and every point. A federal issue of this magnitude must be settled by the Supreme Court of the United States.

III

THE DISTRICT COURT, WHICH IS THE FACT-FINDER IN THIS CASE, METICULOUSLY CONSIDERED ALL THE EVIDENCE AND, LIKE THE COMPTROLLER GENERAL AND THE COMMISSION IN PRIOR CASES, CONCLUDED THAT UNDER MOST OF THE CHALLENGED NASA CONTRACTS, CONTRACTOR-SUPPLIED EMPLOYEES ARE ESSENTIALLY EMPLOYEES OF THE GOVERNMENT TO THE SAME EXTENT AS CIVIL SERVICE EMPLOYEES, AND THAT SUCH CONTRACTS VIOLATE NASA'S ORGANIC STATUTE AND THE FEDERAL CIVIL SERVICE LAWS. THE COURT OF APPEALS BLINDLY AND ERRONEOUSLY REVERSED THOSE FINDINGS, AND THUS EFFECTIVELY OVERRULED NOT ONLY THE DISTRICT COURT'S DECISION IN THIS CASE, BUT THE PRIOR DECISIONS OF THE COMPTROLLER GENERAL AND THE COMMISSION AS WELL

Federal respondents' brief contends that petitioners do not challenge the Court of Appeals' decision to the extent it holds that, in this case, contractor-supplied employees were in no sense the equivalent of regular federal employees. On the contrary, petitioners vigorously contend that, in this regard, the Court of Appeals plainly erred—and that its holding threatens not only huge financial losses for the Government, but ultimate destruction of the federal civil service system

as well. Moreover, as stated above, by so ruling the Court of Appeals has effectively overturned all prior decisions of the Comptroller General and the Civil Service Commission in this area.

The Court of Appeals' decision is clearly wrong because, first, it completely ignores the fact that, at the very outset of this case, federal respondents themselves agreed that many of the NASA support service contracts still challenged in this case, when measured by the prior rulings of the Comptroller General and the Commission, were improper and unlawful (J.A. 188, 189; 1196).

Secondly, the Court of Appeals is wrong because its decision ignores the further fact that, *in this very case, the Commission's investigators (even though outrageously influenced and misled by counsel for federal respondents) reported to the District Court that most of the NASA support service contracts challenged in this case violate 5 out of 6 standards previously established by the Comptroller General and the Commission to judge contract illegality* (J.A. 504, 515-517). Thus, federal respondents' investigators unanimously reported to the District Court that *21 of the 32 NASA contracts challenged in this case meet 5 out of 6 standards for contract illegality* (J.A. 504, 515-517).

Ergo, the investigators' report in this case proves beyond peradventure that under no less than 21 of the 32 NASA contracts at issue, contractor-supplied employees, like regular civil service employes at MSFC—

(1) perform their duties for NASA *"on site"* at MSFC, *side-by-side and intermingled with regular civil service employees and in competition with civil service employees* (J.A. 516-518);

(2) perform their duties with *Government-supplied equipment, supplies and space furnished by the Government on the same basis as that supplied to regular, competing civil service employees* (J. A. 516-518);

(3) perform duties which, *like that performed by competing civil service employees, are part and parcel of NASA's regular governmental functions,* and thus their work is the same as or complementary to that performed by competing civil service employees in pursuit of NASA's integrated work at MSFC (J. A. 516-518);

(4) perform duties which are *the same or comparable to those performed by competing civil service employees* (J. A. 516-518); and

(5) perform their duties *pursuant to arrangements with the employer, NASA, which extend beyond one year—indeed for several years* (J. A. 516-518).

The *sole* point of difference between the District Court's ultimate finding of contract illegality and the investigators' conclusions is in the area of *whether contractor-supplied employees at MSFC actually performed their duties subject to "Government supervision" or merely subject to "contractor supervision."* In this regard, the District Court ruled (Supp. App., pp. 57, 58):

> "In each of these . . . contracts, the Commission concluded that all Pellerzi Elements are present except the sixth—Government Supervision. As to that element, this Court found . . . that *the test which should have been applied is one which necessitates a showing that the inherent nature of the services, or the manner in which they are provided, reasonably requires, directly or indirectly, federal direction or supervision of contractor employees.*

"Moreover, '*the criteria must be realistically applied* and the end-point determination reached on the basis of the over-all substance of the contract operations.' *This realistic approach extends both to the terms of the contract, as well as to the method of performance* thereunder. In this regard, the Court finds that the early contracts are basically standard in form and essentially identical to those reviewed in the Pellerzi [Civil Service Commission] Opinion. The more restrictive and objectionable provisions have either been eliminated from the current contracts entirely, or incorporated into the Request for Proposal. Significantly, however, and as the Commission found, the manner of operation under the current contracts has remained largely unchanged.

"*When properly applied, the sixth Pellerzi [Commission] Element was, and is, present to a substantial degree in each of the . . . contracts analyzed above. Accordingly, notwithstanding attempts to program the contracts to avoid the appearance of an employer-employee relationship between NASA and contractor non-civil service employees, this Court concludes that each of the contracts reviewed above established the proscribed relationship and therefore was, and is, null and void.*" [Italics supplied.]

The District Court's ruling, of course, was predicated directly on the several prior rulings of the Comptroller General and the Civil Service Commission, and regarding the question of whether a contractor-supplied employee working at MSFC is, in fact and in law, subject to the supervision of federal supervisors, the Civil Service Commission's controlling opinion rendered in 1967 stated (J. A. 325-330):

"As stated in *Singer Mfg. Co.* v. *Rahn*, 132 U.S. 518, 523, 10 S. Ct. 175, 33 L. Ed. 440 (1889); ' . . .

the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the results to be accomplished, or in other words, 'not only what shall be done, but how it shall be done'.'

"For evidence of the existence or absence of [NASA's] right to direct or control the work of contractor employees, we look first to the terms of the contracts; then at operations under the contracts; and finally, at what the courts have held in construing the relationship established by contracts similar to the contracts we are reviewing here."

Having examined NASA's support service contracts and operations thereunder in depth, the Commission concluded (J. A. 328-330):

"On this basis, that the terms of the contract are strictly complied with, we ask this question: what discretion does a contractor supervisor have after he receives a task assignment or a technical direction from the Federal official? Does he have authority to decide whether or not to pass the task assignment or technical direction on to the contractor technicians? Does he have authority to modify or change the task assignment or the technical direction in any way? *The answers are clear; the contract supervisor has no such discretion under the terms of the contracts.*

"Who then is controlling or directing the work of the contractor technician; the contractor supervisor who delivers the message or the Federal official who sends the message? *It cannot be the contractor supervisor, even though he may assign different parts of the task to different workers . . . he cannot change the substantive direction that comes from the Federal official. . . .*

"*In our review of operations under these contracts it became even more evident that contracts like these cannot be performed unless the civil servants who are supported on the job have the right to direct the work of the contractor technicians. . . . We find no material difference in the degree of actual direction or control exercised over civil service technicians and that exercised over contractor-supplied technicians of the same class. . . .*

"It seems apparent that the contractor supervisor is merely a *pro forma* supervisor. When this appears, the Comptroller General has stated: "*We must emphasize here that the supervision over the individuals performing the work required under a contract remains in the hands of Government personnel even if the contract provides an additional employee to act as supervisor and relay instructions of Government personnel to other contractor-furnished personnel,* and that the test of supervision by Government personnel must be applied to a contract as it operates even though its terms do not call for supervision' (44 Comp. Gen. 761, 763 (1965)). We agree." [Italics supplied.]

Whereas the District Court studiously and meticulously adhered to the aforementioned rules established by this Court in *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523, 10 S.Ct. 175, 33 L.Ed. 440 (1889) and by the Comptroller General and Civil Service Commission as aforesaid, the Court of Appeals went completely off on its own—and totally contrary to the voluminous, detailed factual record in this case—ruled (App., p. 26a):

"The contracts here were arms-length transactions . . . . [T]he 'day-to-day supervision of the 'physical conduct' on the 'details of the job performed by the individual [employees of the contractor] was in the independent contractor . . . . [W]e find that the standard used here by the trial court was 'too broad'."

Patently, this ruling by the Court of Appeals is totally at odds with the rules historically applied by both the Comptroller General and the Civil Service Commission to determine when contractor-supplied employees are, in effect, federal employees and thus employed in violation of both NASA's organic statute and the entire mass of federal employee legislation. Moreover, in its departure from the established rules, the Court of Appeals' opinion exposes the Treasury of the United States to an unprecedented raid by scores of greedy private contractors anxious to earn huge fees and profits for simply supplying non-Civil Service employees to perform NASA's and other federal departments' regular everyday governmental work functions.

There is nothing in *Kelley* v. *Southern Pacific Railway Co.,* 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974) to justify such a tremendous, costly departure in the federal service. Indeed, in *Baker* v. *Texas & Pacific R. Co.,* 359 U.S. 227, 79 S.Ct. 664, 3 L. Ed. 2d 756 (1959), this Court ruled that each case involving asserted employer-employee relationships must be decided on its own peculiar facts and "ordinarily no one feature of the relationship is determinative." Furthermore, this Court's decision in *Kelley, supra,* was limited exclusively to a construction of the Federal Employees' Liability Act, and in no sense did this Court establish some rigid rule intended to permit free-wheeling federal agencies and hordes of private contractors effectively to circumvent all prohibitions contained in NASA's organic statute and the Civil Service laws, and to saddle the Federal Government with tens of

millions of dollars of unnecessary contractor fees and charges each year solely to supply regular civilian employees readily available through the Civil Service system.[4]

CONCLUSION

The petition for certiorari in this case is well founded; vitally important to both the Federal Government and its employees; urgently necessary to the correction of a clearly erroneous, far sweeping decision of a two-Judge Court of Appeals; and therefore it should be granted.

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[4] Also, in *Kelley*, this Court went to great lengths to emphasize, at 419 U.S. 325: "Nothing in the District Court's findings suggests that petitioner was sufficiently under control of respondent to be either a *borrowed servant* of the railroad or a *dual servant* of the railroad and PMT." Here, the record is replete with evidence, and the District Court specifically found that the contractor employees are *necessarily always under the control of NASA*, so much so that, in truth, they actually serve as employees of NASA to perform NASA's work, *not* the contractor's work. Here, NASA must daily exercise *both supervision and control over all contractor employees whose sole function is to perform NASA's work at MSFC.*